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IN THE

Supreme Court of the United States

GEORGIA-PACIFIC CORPORATION SALARIED EMPLOYEES RETIREMENT PLAN AND GEORGIA-PACIFIC CORPORATION,

Petitioners,

v.

JERRY L. LYONS, individually and on behalf of all other persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF PETITIONERS

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March 2, 2001

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MOTION OF AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS AND AMERICAN BENEFITS COUNCIL FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, the National Association of Manufacturers ("NAM") and the American Benefits Council (the "Council") hereby move this Court for an order granting leave to file the accompanying Brief Amici Curiae in support of Petitioners. The consent of counsel for Respondent Jerry L. Lyons was requested and refused, necessitating this motion.

The interest of amici curiae arises from the uncertain, unanticipated, and potentially uncabined liability faced by their members' employer-sponsored cash balance pension plans as a result of the Eleventh Circuit's decision in this case. Amici curiae believe the decision may undermine the financial stability of existing cash balance pension plans and leave plan sponsors with no guidance on how properly to value future voluntary lump sum distributions to plan participants.

Amicus curiae NAM is the nation's largest and oldest multi-industry trade association. The NAM represents 14,000 member companies (including more than 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Over 158,000 additional businesses are affiliated with the NAM through its National Industrial Council and its Associations Council.

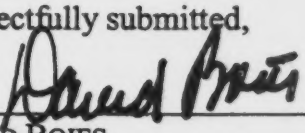
Amicus curiae the Council (formerly the Association of Private Pension and Welfare Plans) is a broad-based, non-profit trade association founded in 1967 to protect and foster the growth of the private employer-sponsored employee benefit plan system in the United States. The members of the

Council include small and large employer sponsors (including many Fortune 500 companies) of employee benefit plans, as well as numerous plan support organizations such as consulting and actuarial firms, investment firms, banks, insurers, and other professional benefit organizations. Collectively, the Council's members sponsor or administer plans covering more than 100 million participants.

Both the NAM and the Council have filed briefs amicus curiae before this Court and other courts in numerous cases involving important employee benefit plan issues and have frequently testified before Congress regarding such issues.

Because of the breadth and significance of the issues arising out of the Eleventh Circuit decision, the NAM and the Council respectfully request leave to file their Brief Amici Curiae.

Respectfully submitted,



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IDENTITY AND STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici curiae NAM and the Council are nationally based trade associations whose members include thousands of employers and employer-sponsored employee benefit plans and numerous plan support organizations. The NAM represents 14,000 member companies (including more than 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Collectively, members of the Council sponsor, administer or support health, retirement, and other benefit plans covering more than 100 million participants.

The NAM and the Council's interest here arises from the uncertain, unanticipated, and potentially uncabined liability faced by their members' employer-sponsored cash balance pension plans as a result of the Eleventh Circuit's decision in this case. Amici curiae are concerned that the decision will undermine the financial stability of existing cash balance pension plans and leave plan sponsors with no guidance on how properly to value voluntary lump sum distributions to plan participants.

SUMMARY OF ARGUMENT

Employer-sponsored retirement plans play a critical role in providing income security to the American workforce, providing retirement income for more than 91 million employees. In that role, these plans have been enormously successful. Trillions of dollars are invested in the employer-sponsored retirement benefit system, which pays more than

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[1] Counsel for amici curiae NAM and the Council authored this brief in its entirety. No person or entity, other than the amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

$240 billion in private sector employee retirement benefits each year. The cash balance plans at issue in this case are a relatively new, innovative form of employer-sponsored defined benefit plan that address many of the particularized needs of the modern, increasingly mobile workforce and are now used by approximately twenty percent of Fortune 1000 companies.

Employers, however, will only invest the trillions of dollars required to fund employee retirement plans if they can have certainty in their future obligations, including certainty and clarity of the amount that the employee is entitled to, and the amount for which the plan is liable, at the time of employee/employer separation. If employers cannot rely on the plain meaning of statutes or even on applicable federal agency interpretations made in individual determination letters, the effectiveness of the private-employer pension system is fatally undermined. Employers must have reasonable certainty in order to innovate and compete. For years, plan sponsors established and funded cash balance pension plans in reliance on ERISA §203(e), 29 U.S.C. §1053(e)'s plain language limiting its application to involuntary distributions. Plan sponsors maintained those plans in reliance on specific, individualized determinations by the IRS that the plans complied with all applicable regulations, including those that govern the valuation of lump sum distributions.

That reliance, and the settled expectations that rest on it, were abruptly upended by the Eleventh Circuit's decision in *Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235 (11th Cir. 2000). By holding that the present value of a lump sum cash distribution had to be determined by projecting an employee's current retirement account balance forward to retirement age using the plan's crediting rate, and then discounting that projected balance back to a present value using a different rate specified by

I.R.C. §417(e), regardless of whether the crediting rate was at a historical peak or trough at the time of separation, the *Lyons* decision created a new "project forward" requirement that upended a previously settled, ordered world.

The decision contradicts the plain meaning of ERISA §203(e) by interpreting that provision to require current cash balances to be projected forward. The decision effectively imposes, retroactively, an interpretation of ERISA §203(e) found only in proposed IRS regulations that have never been finally promulgated, and that by their own terms were intended to have only prospective effect once promulgated. The decision provides plan sponsors with no guidance as to how the Eleventh Circuit's untested new rule should be applied. Finally, the decision effectively turns the one safe harbor for plan sponsors under existing laws into a trap, since plans that seek the shelter of this safe harbor of the tax laws (applying provisions that are substantively identical to ERISA §203(e)) will, as a practical matter, almost always face liability to plan participants under the *Lyons* court's interpretation of ERISA §203(e).

This disruption of settled expectations, combined with the prospect of continuing instability and uncertain liability, can only serve to discourage the development and maintenance of vitally important private employer pension plans, and thus necessitates review by this Court.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION UPSETS SETTLED EXPECTATIONS OF CASH BALANCE PLAN SPONSORS.

The Eleventh Circuit's decision is wholly inconsistent with the settled expectations of cash balance plan sponsors and retroactively imposes hundreds of millions of dollars in pension obligations that plan sponsors never funded, plan

participants never anticipated, and the law never before required.

Prior to the *Lyons* decision, several principles for cash balance plans were clear.

First, by establishing a bookkeeping account that expresses as a single sum the value of an employee's retirement benefit at any given time, cash balance plans improved participants' understanding of the value of their retirement benefits, a feature previously lacking in traditional defined benefit pension plans. *See* GOVERNMENT ACCOUNTING OFFICE, CASH BALANCE PLANS: IMPLICATIONS FOR RETIREMENT INCOME, Report to the Chairman, Sen. Special Comm. on Aging (hereinafter the "GAO, CASH BALANCE PLANS"), GAO/HEHS-00-207, at 19 (2000).

Second, cash balance plans routinely provided that plan participants who elected a lump sum distribution upon separation from their plan would receive the actual value of their bookkeeping accounts at the time of separation.

Third, the IRS, in determination letters provided to employers with cash balance plans structured in exactly this way, had expressly and repeatedly "determine[d] that the[se] plan[s] fully complied with all applicable regulations." *See* Pet. App. 86a. This determination necessarily included a verification of compliance with the rules in I.R.C. §417(e) regarding the valuation of elective lump sum payments. *See* Treas. Reg. §601.201(a)(3); IRS Worksheet Number 2A – Determination of Qualification (Department of the Treasury – Internal Revenue Service) 2000, at V.g. (Pet. App. 77a).

Fourth, neither ERISA, nor the Internal Revenue Code, nor any other statute or regulation provided any guidance as to how the present value calculations contained in ERISA §203(e) might apply to the unique issues raised by voluntary distributions under cash balance plans. *See, e.g.,* Title IV Aspects of Cash Balance Plans with Variable Indices, 65 Fed.

Reg. 41610, 41611-12 (July 6, 2000) (soliciting public comments, in context of plan termination under ERISA Title IV, regarding what method to use to value lump sum payments under cash balance plans and analyzing pros and cons of possible approaches). In particular, nothing in ERISA §203(e) or Treasury Regulation §1.411(a) sets forth, or even suggests, a "project forward" methodology for valuing voluntary lump sum distributions. Indeed, on its face, ERISA §203(e) has nothing whatsoever to do with voluntary, as opposed to mandatory distributions, and the discounting methodology set forth in this provision is only "For purposes of" making determinations under "paragraph 1" regarding whether a lump sum distribution can be made "without the consent of the participant."

Fifth, the first suggestion anywhere that a "project forward" methodology might be appropriate in certain circumstances appears in the preamble to a regulation under I.R.C. §401(a)(4). *See* 56 Fed. Reg. 47524, 47528. The infirmity of this authority, however, is revealed by the fact that the IRS itself continued to issue determination letters approving cash balance plans that did not include "project forward" provisions even after the date of the proposed regulations – a clear recognition by the IRS that the calculation methodology in the §401(a)(4) regulations was not universally applicable.

Finally, the only time the IRS made even a tentative attempt to define or apply a "project forward" methodology to value lump sum distributions in cash balance plans was in IRS Notice 96-8, issued in 1996. *See* I.R.S. Notice 96-8, 1996-1 C.B. 359. This Notice, however, only reinforced the view that no such methodology was required under existing law, stating in its "Purpose" section: "The proposed guidance is being described in this notice in order to permit advance public comment in anticipation of regulations that incorporate the proposed guidance." (To date, this "proposed

guidance" has still not been finalized.) The Notice also included a safe harbor provision "for plan years beginning before regulations are effective" that saved plans from tax disqualification where they had made distributions based on a "reasonable, good-faith interpretation of the applicable provisions of the Code, taking into account preexisting guidance."

Acting in this legal environment, plan sponsors established, administered, and funded cash balance plans with the settled expectations that compliance with ERISA and the tax laws required nothing more than to pay plan participants voluntary lump sum distributions that were exactly equal to what had been promised in plan documentation and what the participants themselves expected, *i.e.*, the amount in their bookkeeping accounts. IRS Notice 96-8 was the first time any new methodology was even suggested, and, even then, the IRS recognized that the "project forward" methodology was a change in the law that was simply being explored on a prospective basis with accommodation to be made for the fact that employers had never understood this approach to be legally required.[2]

By turning this settled universe on its head, the Eleventh Circuit's decision not only potentially imposes hundreds of millions of dollars of unexpected and unfunded obligations (which ultimately must be guaranteed by the Federal Government through the Pension Benefit Guaranty Corporation, *see, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637-38, 110 S. Ct. 2668, 2671 (1990)), but also creates a climate of uncertainty that will have a

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[2] Significantly, even after issuing Notice 96-8, the IRS has never made any attempt to tax disqualify cash balance plans that had received favorable determination letters. Nor has the IRS ever invoked the formal procedure for revoking those determination letters, *see* 26 C.F.R. 601.201(l)(4)-(5).

chilling effect on the development and maintenance of private employer pension plans across the U.S. economy.

Private employer pension plans are critical to the retirement income of American workers. Such plans pay almost one third of pension income received by retirees in the United States, and the employer-sponsored retirement system in the U.S. pays more to retirees than does Social Security. *See* "Finances of Employee Benefits", EBRI NOTES (July 2000). Cash balance plans, in particular, have become an increasingly popular form of pension plan for employers who recognize that traditional plans heavily backload benefit accrual, thereby disadvantaging younger, lower-paid, and more mobile employees, as well as those who leave and return to the workforce, or who wish to work beyond retirement age. See Richard C. Shea, et al., *Age Discrimination in Cash Balance Plans: Another View*, 19 VA. TAX. REV. 763, 764-65 (2000). Because cash balance plans address these shortcomings they have been adopted in recent years by one in five Fortune 1000 companies, which find them an effective recruiting tool. See GAO, CASH BALANCE PLANS at 17-18, 42.

The decision to establish or continue a private pension plan is, however, purely voluntary. Employers' willingness to contribute many billions of dollars in their voluntary retirement plans or to adopt innovative pension plan solutions (like cash balance plans) depends on the availability of some advance certainty regarding the legality of their plans, and the exact obligations plan sponsors will be assuming. *See, e.g.*, GAO, CASH BALANCE PLANS, at 42 (continued uncertainty about cash balance plans discouraged plan sponsors from adopting them). Currently, the only mechanism for gaining advance certainty is the legal determination letters provided by the IRS. Indeed, "the favorable determination letter serves as an 'insurance policy' for the practitioner and the employer that the retirement plan is qualified as to form and,

in certain circumstances, as to operation." Barbara A. Breeding, *Qualifying a Plan Through the IRS*, SD81 A.L.I.-AB.A. 571, 573 (1999). *See also* Kenni B. Merritt, *Voluntary Governmental Compliance Programs: Chicken Soup for the Employee Benefit Plan*, 25 Okla. City U. L. Rev. 351, 357 (2000) (to same effect). Accordingly, "employers routinely have sought and obtained the blessing of the IRS on the qualification of their cash balance conversions." Unifi Network, *A Unifi Survey of Conversions from Traditional Pension Plans to Cash Balance Plans* [hereinafter, *Unifi Survey*], at 16 (2000). *See also id.* at 15-16 & t.5 (reporting that 55 of 57 surveyed firms that converted to cash balance plans between 1985 and 1996 had obtained favorable determination letters). Whatever weight such letters carry outside of the tax qualification of pension plans, as a practical matter employers must be able to place some reliance in the representations of the federal agency charged with administration of the very statute in question.

Yet, by ignoring settled expectations that were well-founded in the language of the ERISA statute, the Treasury Regulations, and in the IRS's own determination letters, the Eleventh Circuit's decision creates an environment that can only work to discourage plan sponsors' overall willingness to provide pensions to their employees. Indeed, after the *Lyons* decision, adoption of any innovative new pension plan is a fool's game, since the ultimate funding obligation for such a plan is completely indeterminate, regardless of what the IRS might say. For these reasons, the Eleventh Circuit's decision raises questions of particular importance for plan sponsors nationwide and indeed, for the retirement security of American workers.

II. THE DECISION BELOW IMPOSES AN UN-ADMINISTRABLE OBLIGATION ON PLAN SPONSORS WHILE CREATING AN IRRECONCILABLE CONFLICT BETWEEN SUBSTANTIVELY IDENTICAL ERISA AND IRS RULES.

The Eleventh Circuit's decision not only retroactively upsets settled expectations, but, even *prospectively*, sets plan sponsors adrift, without any guidance on how to apply the "project forward" calculation the Eleventh Circuit finds in ERISA §203. This uncertainty is all the more significant in light of the IRS's contrary interpretation of its substantively identical rules.

The Eleventh Circuit held that payment of a voluntary lump sum benefit prior to retirement requires that a cash balance plan project the employee's existing bookkeeping account balance *forward* to retirement age using the plan's interest crediting rate, and then discount the value of the benefit *back* to the present using a different interest rate in I.R.C. §417(e). 21 F.3d at 1251. The Eleventh Circuit's decision, however, fails to recognize that its creation of a "project forward" requirement for cash balance plans leaves wholly unanswered the question of how a "project forward" methodology should apply. There is no clear answer to this question because any "project forward" requirement must make an inherently speculative assumption about a variable index's future performance after the date the lump sum distribution is paid.[3]

Indeed, the Pension Benefit Guaranty Corporation ("PBGC") is still struggling with this question. In the context of a recent request for public comments regarding the

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[3] Although a fixed crediting rate avoids this particular issue, the great majority of cash balance plans base interest credits on variable indices like the Treasury bond rates. *See* note 3, *infra*.

valuation of cash balance plans upon plan termination, the PBGC noted several possible approaches: designating a standardized value that would apply to all plans that terminated on a given date; making a "best estimate" determination for each plan termination; using the index as it stood on the plan's termination date (the "spot rate"); or using some "historical average" of the index. *See* 65 Fed. Reg. at 41612.

The PBGC recognized, however, that each of these approaches has its downsides: "a standardized PBGC value could lead to results that would diverge significantly from what one would expect based on the variable index a plan chose"; the "'best estimate' approach might leave too much discretion with the PBGC"; the "spot rate" approach raises issues "where the index was at (or near) a historic high or low or where, as in the case of an equity index, the change in the index could be negative"; and "the 'historical average' approach would raise questions as to the period over which the variable index should be averaged . . ., the method of averaging, [and] the data's applicability to the future, particularly where the variable index had existed only for a short time or was volatile (*e.g.*, a stock index)." *Id.* Ultimately, the PBGC said it was "actively considering" an approach that "combine[d] elements of the "spot rate" and "historical average." *Id.*

Instead of recognizing the nuances of this problem, the Eleventh Circuit's decision exacerbates it by assuming the issue away. The Eleventh Circuit effectively determined that Georgia-Pacific should use the spot rate to project forward Lyons' retirement benefits. But, the Eleventh Circuit's reasoning was wholly predicated on an erroneous presumption that the "Plan itself" specifies that Respondent's "hypothetical account balance must be projected forward using" what was the spot rate. *Lyons*, 221 F.3d at 1252.

Thus, the Eleventh Circuit's decision opens a void for plan sponsors nationwide by simply referring back to the "Plan itself", which, in many cases (including Georgia-Pacific's Plan, contrary to the Eleventh Circuit's determination), does not identify an appropriate crediting rate – be it the "historical rate," the "spot rate" the "best estimate rate," or some blend of some or all of the above – because, at the time the plans were created, no one contemplated a "project forward" requirement. This creates an untenable situation for plan sponsors who, under the Eleventh Circuit's rule, are subject to liability for failing to project forward, but are offered no guidance on what methodology they can use to insulate themselves from liability.

Nor are plan sponsors assisted by assuming that the Eleventh Circuit is requiring an across-the-board application of the spot rate (*i.e.*, the prior year's crediting rate) for the project forward calculation, something the Eleventh Circuit actually did not hold. As the PBGC recognized, using the spot rate can lead to wild and unpredictable swings in plan sponsors' liabilities and employees' accounts, particularly where a volatile stock index forms the basis of the crediting rate and the "index was at (or near) a historic high or low or where, as in the case of an equity index, the change in the index could be negative." 65 Fed. Reg. at 41612.[4]

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[4] The Eleventh Circuit dismissed the stock index issue as a "farfetched" "hypothetical." 221 F.3d at 1249 n.23. In fact, as the PBGC comments show, it is a very real issue. Indeed, a recent survey of 100 cash balance plans identified two plans that used variable interest crediting rates based on mutual fund index returns. *See Unifi Survey*, at 49-51. Regardless, even a crediting rate based on a 10-year Treasury security can vary significantly over the course of a few years, variations that, when compounded forward to retirement age, will themselves create great disparities and huge administration problems for plan sponsors applying the Eleventh Circuit's rule. For example, the yield on 10-year Treasury Constant Maturities (one of the safe harbors designated in Notice 96-8) fluctuated between 7.42 percent in 1977 and 13.92 percent in 1981, and

Not only does the Eleventh Circuit's decision create a void for plan sponsors, it also simultaneously removes the sole existing guidance on this difficult issue. IRS Notice 96-8 tentatively suggests a prospective "project forward" requirement like the one the Eleventh Circuit imposed.[5] The IRS, however, plainly recognized (in a way that the Eleventh Circuit did not) that there can be no computational certainty in "projecting forward" benefits to retirement age. Thus, the IRS provided for a number of "safe harbor" interest crediting rates that plan sponsors could use and thereby *avoid* the "project forward" requirement altogether yet still be certified as "tax qualified." These "safe harbor rates" attain a rough equivalence with the discount rate in I.R.C. §417(e) (30-year Treasury bonds) such that dispensing with the project forward/discount back approach leads to roughly the same result as simply using the current balance in a participant's bookkeeping account.[6]

But, the Eleventh Circuit's decision – based on substantively identical provisions of ERISA – turns this safe harbor into a trap by creating a rule that almost invariably results in cash balance plans incurring liability to plan

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then fell back to 7.67 percent by 1986. *See* Federal Reserve Statistical Release H.15, Selected Interest Rates (Feb. 20, 2001).

[5] As discussed, Notice 96-8 does not, however, support the Eleventh Circuit's retrospective application of the "project forward" rule; indeed, its explicit language directs that the rule should apply only prospectively, *see* I.R.S. Notice 96-8, 1996-1 C.B. 359, at IV.B, and creates a safe harbor for plan sponsors who did not apply the project forward methodology before the regulations were promulgated, *see id.* at IV.A.

[6] In other words, projecting the existing balance forward using one rate and then discounting back using a different, but roughly similar rate, will lead to a result that approximates the existing account balance. Through its choices of acceptable safe harbor crediting rates (which are different from, but have historically been roughly equal to the 30-year Treasury bond rate used in I.R.C. §417) the IRS ensures this result.

participants whenever the safe harbor is used. This creates inconsistent obligations that effectively render the safe harbor provision of Notice 96-8 meaningless. While, for tax qualification purposes, a plan sponsor theoretically could adopt one of the safe harbor crediting rates to make voluntary lump sum distributions equal to the current value of a participant's bookkeeping account, no plan sponsor can realistically take advantage of this option since, under *Lyons*, the plan sponsor would still be subject to liability if it made this lump sum distribution.[7]

Plan sponsors who voluntarily choose to offer pension plans and then comply with all IRS rules should not be subjected to court-imposed liability to plan participants under the identically worded provisions of ERISA. This untenable situation is exactly what Congress has historically sought to prevent. *See generally* ERISA §3002(c), 29 U.S.C. §1202(c); Reorganization Plan No. 4 of 1978, §104, 92 Stat. at 3791 (in pursuing civil actions to enforce "Parts 2 and 3 of Subtitle B of Title I of ERISA...the Secretary of Labor shall be bound by the regulations, rulings, opinions, variances, and waivers

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[7] As Georgia Pacific has ably demonstrated in its own brief, this is not a hypothetical threat. *See* Petition for Writ of Certiorari, No. 00-1234, at 23-24. For example, Notice 96-8 allows cash balance sponsors to comply with ERISA §203(e) and Treasury Reg. §§1.411(a)-11 and 1.417(e)-1(d) by using a "safe harbor" interest crediting rate equal to the prevailing three-month Treasury bill rate plus 175 basis points (1.75%). Thus, under Notice 96-8, use of this crediting rate would permit a plan sponsor to distribute to a participant a lump sum equal to the current bookkeeping account balance even in months (as has historically been the case) when the gap between this crediting rate and the Code §417(e) discount rate has been as high as 100 basis points. Yet, under *Lyons*, a plan sponsor, even after complying with Notice 96-8 and receiving a favorable tax determination letter, would still be subject to liability under Title I of ERISA for making precisely this distribution. Indeed, the Eleventh Circuit imposed liability on Georgia-Pacific for failing to "project forward" where the gap between the crediting rate and the Code §417(e) discount rate was only 75 basis points.

issued by the Secretary of the Treasury"). Yet, the Eleventh Circuit simply dismissed the problem without concern for the fact that Georgia-Pacific could "be safely harbored only from tax disqualification, [but] not from liability to plan participants." 221 F.3d at 1250 n.28.

Broadly applied, this holding threatens to unravel the closely knit scheme for congruent tax and liability regulation of pension plans, with profound consequences for plan sponsors. Even narrowly applied, the holding effectively obliterates the safe harbor provisions of IRS Notice 96-8 and leaves plan sponsors at sea as to how they might apply a "project forward" methodology that would insulate them from liability under the Eleventh Circuit's new rule. For these reasons, the Eleventh Circuit's decision raises a question of exceptional importance for pension plan sponsors nationwide.

CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that the petition for certiorari should be granted.

Respectfully submitted,

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